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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-334

SEYMOUR MATANKY, M.D.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To The Honorable Chief Justice Warren Burger and To The Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Seymour Matanky, M.D., respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse judgments of conviction of 39 counts of alleged violation of Title 18, Section 1001, U.S. Codes, for want of jurisdiction of the alleged offenses and for serious

prejudicial errors committed in the trial of the case, denying petitioner fair trial guaranteed by the Fifth Amendment to the Constitution of the United States. The doctor was fined $1500 on each of 39 counts or a total of $58,500, and sentenced to three years, suspended and placed on probation for one year.

Fundamental issues raised by this case and this petition are whether the indictment charges any offenses against the laws of the United States. and whether this Court and the Court below or Congress has the power to make law; whether the Court below failed either to acquit or to give an instruction on the lesser and necessarily included offense pursuant to Rule 31 (c), F.R.Cr.P., as provided by *Keeble v. U.S.*, 36 L.ed. 2d 844, recently decided by this Court; whether the Court omitted giving a full and correct definition of the word "willful", as connoting an evil motive or bad purpose as defined in *U.S. v. Bishop,* 36 L.ed. 2d 941, *Spies v. U.S.,* 317 US 496, and *Screws v. U.S.,* 325 US 91, 106; and whether the petitioner was denied a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States when the government, having the facts on which they based their case as early as 1970, failed to present it to the Grand Jury until April 5, 1972 and failed to bring the case to trial until October 3, 1972 so that some witnesses who could have been available had died in the interim, and the defendant lose the availability of their testimony to prove his innocence. (*Brady v. Maryland,* 373 US 83, 10 L.ed. 2d 215)

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S. Codes, and by Rule 23 of this Court.

The Court of Appeals rendered its decision July 5, 1973. A petition for rehearing was duly filed and denied July 25, 1973.

This petition for writ of certiorari is being filed within 30 days thereafter, within the time allowed by law.

OPINIONS BELOW

The opinion of the Court of Appeals rendered July 5, 1973 is attached hereto and marked Appendix "A", and made a part hereof as though fully set forth herein.

The order of the Court of Appeals denying the petition for rehearing, dated July 25, 1973, is attached hereto marked Exhibit "B", and made a part hereof as though fully set forth herein.

The opinion of Judge William Gray, who heard the motion to dismiss the case under Section 1001 of Title 18, U.S. Codes, because the offenses, if any, were covered by Title 42, Section 408(b), is attached hereto and marked Appendix "C", and made a part hereof as though fully set forth herein. It is cited in *U.S. v. Matanky,* 346 F. Supp. 116. On motion for new trial petitioner's new and present counsel urged the court to grant motions for new trial and dismiss the indict-

ment. The trial court denied the motion. There was error under *Keeble v. U.S.*, 36 L.ed. 2d 844 (Rule 31 (c)) in failure to instruct the jury as requested by the defense.

Petitioner requested instructions (R.T. 1374) as follows:

> "MR. CANTILLON: . . . The only other thing I have, your Honor, that I have been giving some consideration to since last night, is this issue of a lesser included offense. (31(c) F.R. Cr. P.)
>
> * * *
>
> "MR. CANTILLON: In the motion. (Continuing) — in which the United States Supreme Court held that the general false-claim statute required the specific intent to cheat and defraud. In that situation they were dealing with — I don't specifically recall, maybe I can find it here in a moment if the Court will bear with me.
>
> "The case is *Barlett v. United States,* 166 F2d 920. That case involved an alleged false claim under the Emergency Price Control Act of 1942. The defendant claimed he should not have been prosecuted under the general statute, but he should have been prosecuted under the special statute. The Supreme Court in rejecting his contention stated that the misdemeanor section under the Emergency Price Control Act, Section 205(b) covers a false statement or entry, whereas Section 80 — which is now our Section 1001 — involves the element of intent to cheat, swindle or defraud; that this was not an element of the misdemeanor section or 205 (b). And I would submit to the Court that the language contained in — the Court said:

> " 'The two sections are not in irreconcilable conflict. Section 80, supra, covers cases where the elements of intent to defraud and fraudulent scheme are present. Section 205(b) covers cases of statements and entries false in any material respect willfully made.'
>
> "That latter language is virtually the same language that you find in 408(c), Title 42, that deals with the Social Security Act. So I think that the Court should probably give this jury instructions on the lesser included offense of 408(b), having one less element than the general statute.
>
> "I think that concludes my objections to the charge.
>
> "THE COURT: (Judge Williams, trial judge) I will deny that, because I think the ruling of Judge Gray on the motion was correct."

This was reversible error. (*Keeble v. U.S.*, 36 L.ed. 2d 844; Rule 31(c), F.R.Cr.P.)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved are:

The Fifth, Sixth, Ninth and Tenth Amendments to the Constitution of the United States.

Title 18, Section 6; Title 18, Section 1001; Title 42, Section 408(b) and Title 42, Section 1395, et seq. U.S. Codes.

Rules 29, 31(c), 33, 34, 48(b) and 52(b), Federal Rules of Criminal Procedure.

THE FACTS

Dr. Seymour Matanky, the petitioner herein, was charged in an indictment returned April 5, 1972 in the Central District of California, with knowingly and willfully making and causing to be made "false statements to a government agency" for medical services rendered to patients in convalescent hospitals contrary to the claim set forth in the form presented to the private insurance carriers involved. Petitioner denies the charges but also asserts such claim to such private insurance carrier does not violate the laws of the United States under Title 18, Section 1001, U.S. Codes, as charged, and that he was entitled to acquittal. (*Keeble v. U.S.*, 36 L.ed.2d 844)

The Doctor, a 46 year old Doctor of Medicine, who was a Battalion Surgeon in the Korean War, testified that he taught medicine and treated a great many poor people at the Los Angeles County General Hospital under the auspices of the Loma Linda School of Medicine without compensation for nine years.

Because he attended the elderly, particularly in convalescent hospitals, long before Medicare came into existence, (R.T. 962, 969) his practice became quite extensive and busy. He specialized particularly in geriatric care. On account of his busy work schedule his forms 1490 were made out by his secretaries, to whom

he left the details of checking up the dates, the facts and other data to put on the forms. He signed them as presented to him by these secretaries in brief and routine manner, typical of busy business and professional men. There was no evidence that his signing was to cheat, or defraud.

Form 1490 was a form sent to the private insurance companies by the doctor's office and were processed and paid whenever & for whatever amount the insurance companies determined after they had checked up the same. They were paid on a private bank account, to-wit, Wells Fargo Bank in the case of Blue Shield and these were payments for the State of California under the Medi-Cal Program; the other insurance companies were Occidental Insurance Company and Travelers Insurance Company, also private insurance companies, who paid the accounts through private banks. No United States Treasury checks were ever received.

There was no proof presented by the government in the trial that the signing or presentation of the claims was "willful", that is, with an element of evil motive and with intent to defraud the government. Congress has formulated the requirement of "willfulness" as bad faith or evil intent. (*U.S. v. Murdock,* 290 US 398) Or "evil motive and want of justification". (*Spies v. U.S.,* 317 US 498; *U.S. v. Bishop,* 36 L.ed. 2d 951) The trial court failed to instruct the jury in this respect.

In tax cases, this Court has said that the government must show that the document was known by the

taxpayer to be *fraudulent* or to be false as to a material matter. (*U.S. v. Bishop,* 36 L.ed.2d 941, 951) No evidence showed the Doctor had such guilty knowledge or acted fraudulently or "willfully."

Discussing the word "willfully", this Court said: in *U.S. v. Bishop* 36 L.ed. 2d 951:

> **"This long-standing interpretation of the purpose of the recurring word 'willfully' promotes coherence in the group of tax crimes. In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law. The Court has said, 'It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care.' *Spies,* 317 U.S., at 496, 87 L. Ed. 418. Degrees of negligence give rise in the tax system to civil penalties. The requirement of an offense committed 'willfully' is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court. *James v. United States,* supra, 366 U.S., at 221-222, 6 L. Ed. 2d 246. Cf. *Lambert v. California,* 355 U.S. 225, 2 L. Ed. 2d 228, 78 S. Ct. 240 (1957). The Court's consistent interpretation of the word 'willfully' to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers."**

The same may be said to be true of doctors whose busy work saving lives and healing the lame and the sick and who were neither designed nor equipped to do paper work or fill out forms, ordinarily left to their clerks or nurses.

This Court on May 29, 1973, handed down the case of *Keeble v. U.S.*, 36 L.ed.2d 844 (No. 72-5323), in which the headnote stated that if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser-offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal.

In the case at bench the court refused a lesser-offense instruction requested in accordance with 42 Sec. 408(b) and Rule 31(c) F.R.Cr.P.

The prosecution did not establish the elements of guilty knowledge or willfulness, nor did the prosecution establish that the claims were filed in a matter within the jurisdiction of a department and agency of the United States, as required by the provisions of Title 18, Section 1001 and Title 18, Section 6.

A request by the defense for an instruction on a lesser included offense, if the evidence would permit the jury rationally to find him guilty of the lesser offense (Title 42 Sec. 408(b) and acquit him of the greater Title 18 Sec. 1001 (Rule 31(c), F.R.Cr.P.), was rejected.

Prior to trial then-defense counsel made a motion to dismiss the indictment on the ground that the charges should have been brought under Title 42, Section 408 (b), U.S. Codes, and not under Title 18, Section 1001. The motions were transferred from Judge David Williams, to whom the case was assigned for trial, to Judge William Gray, who heard the motions and denied them

and wrote an opinion which is in appendix C and reported in 346 F.Supp. 116 (*U.S. v. Matanky*). The trial of the case was referred back to Judge Williams and at the close of the evidence and at the time of considering the instructions to the jury, then-defense counsel, Mr. Cantillon, asked the Court to instruct the jury that it could find the defendant guilty of a lesser and necessarily included offense of violation of Title 42, Section 408(b). The trial Judge said "I will deny that because I think the ruling of Judge Gray on the motion was correct". This was reversible error under the provisions of Rule 31(c), F.R.Cr.P. and under this Court's recent holding in *Keeble v. U.S.*, 36 L.ed.2d 844.

Subsequent to the jury's verdict present counsel, Morris Lavine, was substituted for trial counsel, James Cantillon, and promptly moved the Court, prior to judgment and sentence, to dismiss the case for the reason that Title 18, Section 1001 did not and does not apply and for the further reason that payment under Medi-Cal and Medicare Programs is administered by private insurance carriers and not by agencies and departments of the United States and that claims for medical care were presented to private insurance carriers and paid by them out of their private bank accounts.

It was contended by new defense counsel that the Court throughout was without jurisdiction to try the petitioner under Title 18, Section 1001 and that the case therefore should be dismissed. The trial Judge denied this motion.

Since that time, this Court has said in *Keeble v. U.S.*, 36 L.ed.2d 844 (No. 72-5323), in a headnote, that if the prosecution has not established beyond a reasonable doubt every element of the offense charged and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal.

The trial Court neither dismissed the indictment nor gave the requested instruction on lesser included offense.

Dr. Matanky explained to the Court and jury that the State of California, as a State, set up a Medi-Cal Program for welfare recipients (the poor people particularly). Claims for these services were being paid by the State of California. On the other hand, Medicare patients are private patients over 65 years of age. All but two of Dr. Matanky's patients named in the indictment were under the Medi-Cal Program, that is, the program operated by the State of California and thus, again, not under federal jurisdiction. (Ninth and Tenth Amendments U.S. Constitution)

The Medi-Cal Program in the State was arranged with Blue Shield and all of the counts in the indictment which relate to claims or payments by Blue Shield were and are under the jurisdiction of the State of California and therefore the federal Court had no jurisdiction of the matters involved in the counts in which the petitioner was charged with making false

claims to Blue Shield, a matter therefore solely in the jurisdiction of the State of California.

Only two other patients are named in the indictment relating to the Medicare Program, to-wit, Robert Lane (Counts Eleven and Twelve) and Henry Johnson (Count Forty).

Prior to trial Dr. Matanky engaged James Cantillon as his trial attorney. Although Mr. Cantillon possessed a very good reputation as a criminal trial lawyer, several events occurred subsequently that proved that the Doctor was unfortunately not being represented adequately or properly in this trial, resulting in the omission of certain vital matters of defense which would have proved the Doctor innocent of the charges of which he was subsequently convicted. (See *Powell v. Alabama,* 287 US 45, 77 L.ed. 158; *People v. Ibarra,* 60 C.2d 460)

Before the trial Mr. Cantillon asked the Court to continue Dr. Matanky's case as Mr. Cantillon was otherwise actually engaged in trial involving the Bubble-Up Company. His application for the continuance was denied by the trial Judge and subsequently by the Court of Appeals on an application for a writ of mandamus.

When the trial of the present case started, the Judge stated Mr. Cantillon received an injury which caused Mr. Cantillon to be absent from the Court on the second day of trial and the Judge subsequently told him he could conduct the case sitting down rather than at

the lectern, as is customary in the federal Courts of Los Angeles. Although he made some necessary motions, he failed to make other highly important and necessary motions, such as a motion to dismiss for want of jurisdiction of the many counts under the Medi-Cal Program and over which the federal Court had no jurisdiction and were solely in the jurisdiction of the State of California. He failed to move to dismiss the indictment because the indictment charged that the private insurance companies were "paying agents" for the government but not *agencies* as defined and limited by Title 18, Section 6, U.S. Codes.

Thereafter, in the trial of the case, a very important matter arose regarding the motive in instituting prosecution of Dr. Matanky, to-wit, Dr. Matanky had testified he discovered that narcotics and other medicines were disappearing from the Reseda Convalescent Hospital, one of the hospitals which Dr. Matanky serviced. Dr. Matanky had begun to question Mrs. Marian London, then a director of nurses at the facility. On cross-examination of Mrs. London the Judge interrupted Cantillon to say that he could not go into this matter unless he made an offer of proof. Cantillon said he would make one later but never did. There were other occasions where he also said he was going to make an offer of proof but did not do so. (R.T. 466)

During the trial of the case, the prosecutor asked questions relating to the quality of care given by the Doctor and Cantillon objected that this was outside

of the scope of the indictment. Cantillon said he was not prepared to meet this issue. When the Judge overruled him he failed to ask for a continuance to prepare to meet this issue and to ask to strike this evidence as outside the scope of the indictment.

At the close of the government's case, he failed to make motions for judgments of acquittal under Rule 29, F.R.Cr.P., and again he failed to renew or make the same motion required under Rule 29 at the end of the cases of both the government and the defense. This was vital to preserve appellant's rights on appeal.

Although the indictment amount totalled $2,156.60 over a two year period, Mr. Cantillon failed to bring this to the attention of the Court and the jury. He failed to object effectively to a final prejudicial argument by the prosecutor that there was $60,000 to $70,000 per year involved and he did not move to strike this remark nor get a ruling by the Judge.

The highly prejudicial character of this argument made in the closing argument of the prosecutor denied petitioner fair trial guaranteed by the Fifth Amendment to the Constitution of the United States. Cantillon did not make this assignment, but this Court can note its effect as plain error on the face of the record (Rule 52b) which the Court of Appeals failed to do.

Each of the counts of the indictment charged the Doctor with having committed the acts "willfully", yet the attorney failed to submit an instruction to the Court or request the Court to instruct the jury fully as to the

meaning of the word "willfully" as this Court and other Courts have defined it in *U.S. v. Bishop,* 36 L.ed. 2d 941, *Spies v. U.S.,* 317 US 496, 87 L.ed. 418, and *Screws v. U.S.,* 325 91, 106, 107, 89 L.ed. 1495.

Petitioner had available to testify on his behalf five different patients named in the indictment. Trial counsel neglected and failed to call them. Neither did the prosecutor. Subsequently they gave sworn affidavits that Dr. Matanky had attended to them and rendered all care billed for, to-wit, Katherine Seedorf (C.T. 171), Anna Epstein (C.T. 173), Myrel Martin (C.T. 175), Florio Squazzo (C.T. 177), and Ray Sanford (C.T. 216). The government did not deny these facts. Their affidavits were presented later on the motion for new trial when petitioner had secured other counsel and were uncontradicted by the government.

The facts on which the government proceeded were known to the government as early as 1970, relating to claims from 1968 to 1970, many of the persons named in the indictment and who could have given testimony favorable to the Doctor had died. Their statements were not perpetuated while they were still alive. The indictment was not presented to the Grand Jury and no indictment was returned until April 5, 1972. Trial did not start until Oct. 3, 1972. Thus the petitioner was denied speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States and Rule 48(b), F.R.Cr.P. The dead patients were Mary Fleig (Counts One and Ten); Samuel Krasne (Count Six; Ida Azine

(Count Seven). Dismissal of the charges is the only possible remedy. (*Strunk v. U.S.*, 37 L.ed. 2d 56)

One of the three percipient witnesses produced by the government was Audrey Gunderson. She was a patient of the State Mental Hospital at Camarillo and had been adjudged legally insane in 1938 and her sanity has never been declared restored. She was placed on the witness stand by the prosecutor without revealing to the Court or defense or the jury that she was legally insane. Thus he vouched for her as a competent witness for the government.

Robert Lane, another percipient witness, was testified to as a chronic alcoholic whose alcoholism has affected his memory. He was also placed on the witness stand by the government to bolster its case, and vouched for by the government.

A third witness, Margaret Clark, in her seventies was shown by the statement of Pearl Schmerherm who had roomed near her as being clearly mistaken. The seven counts of the indictment dropped on the eve of the trial related to Pearl Schmerherm.

These were the only three percipient witnesses that the government produced who claimed to have had any knowledge of their own as to the matters charged in the indictment. By placing the three witnesses on the stand the government vouched for the competency and credibility to the jury.

Although the government produced Marian London

and Dorothy Pfieff and others who claimed they did not see the Doctor two times a week, to attack his claim of attendance, they all testified that they worked at different times and different hours and not a single witness produced by the government stated that they knew of their own knowledge that the Doctor had not been in the convalescent hospital where they worked caring for his patients two or more times a week at other times than their shifts. Other nurses and hospital personnel testified that the Doctor had made the number of visits set forth in his claims. These witnesses were Hana Eichenbaum (R.T. 1163), Sedly-Gale Barnwell (R.T. 734, et seq.), and Ilene Harper (R.T. 717).

On motion for new trial, petitioner furnished the Court with affidavits from the patients who had been available but not called by his counselor or the government and also 200 or more letters which had been sent to the Probation Department and which present counsel asked to be received in support of the motion for new trial or to have the case continued so that affidavits could be obtained from these patients in support of the motion setting forth their knowledge of the high quality of care given to the patients by the Doctor. The motion was denied.

During the course of the trial the prosecutor kept asking each government witness if they knew the Doctor and could identify the Doctor as "the man with the beard," thus prejudicing the Doctor in the eyes of the jurors who did not believe in modern hairdress and

denying the petitioner fair trial, guaranteed by the Fifth Amendment to the U.S. Constitution. (*Ham v. So. Carolina,* 35 L.ed. 2d 52)

As further prejudice, the government started out with 46 counts, which they reduced to 39 counts, which could have called for a maximum sentence of 460 years and in itself was highly prejudicial to a fair trial of petitioner. The alleged course of conduct was the same and could have been contained in a single count or a few counts, thus enabling the Doctor to have fair trial guaranteed by the Fifth Amendment to the Constitution of the United States. This was both expensive to the government and to the defendant and prejudicial and unnecessary. Several of the separate counts concerned the billing for the same patient.

A motion was made by trial counsel to dismiss the case upon the ground that Title 42, Section 408(b), U.S. Codes, covered the matters involved under the Social Security Act and that this precluded a prosecution under Title 18, Section 1001. The District Court denied the motion. (*U.S. v. Matanky,* 346 F.2d 116) This was prejudicial error. (*Keeble v. U.S.* 36 L.ed.2d 844)

A statement to an insurance company is not a false statement to a government agency.

Only Congress is authorized and can make an agency or a department of the United States and only such agency and department as designated by Congress can give such a department and agency jurisdiction and estabish acts that would constitute a crime.

Section 1 of Article I of the Constitution vests all legislative powers "in a Congress of the United States which shall consist of a Senate and House of Representatives . . ." (54 Am.Jur., p. 530, Sec. 13)

Congress had apparently also thought that only the special statute contained in the Social Security Act, Title 42, Section 408(b), should apply rather than Title 18, Section 1001, or it would not have passed Title 42, Section 408(b) specifically to apply to possible violation of the Social Security Act. Title 18, Section 1001 very obviously deals with many matters not covered or affected by the Social Security Act.

On motion for new trial, present counsel substituted for the trial counsel, and urged the motion to dismiss on the ground that there was no jurisdiction at all to try the petitioner under Section 1001. This was denied again by the trial Court and also by the Court of Appeals. Title 18, Section 6 clearly sets forth the Congressional definition of *agencies* of the United States which have jurisdiction to invoke Title 18, Section 1001, U.S. Codes.

The Court of Appeals overruled this contention also. The issue was also raised that Section 1001, as construed and applied in this case, is sufficiently unclear and indefinite to constitute penal legislation; that it sets up no duties or obligations of the Doctor and furthermore that the Social Security Act definitely forbids as follows (Title 42, Section 1395):

"Nothing in this subchapter shall be construed to

authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or persons providing health services; or to exercise any supervision or control over the administration or operation of any such institution, agency, or person."

QUESTIONS PRESENTED

1. Whether the petitioner is entitled to judgments of acquittal where the prosecution did not establish beyond a reasonable doubt every element of the offense charged under Section 1001 of Title 18, U.S. Codes, and where no lesser offense instruction, although offered, was given to the jury.

2. Whether the trial Court erred in holding that a Social Security case could be prosecuted under Title 18, Section 1001, where Title 42, Section 408(b) specifically authorizes a prosecution under the Social Security Act, if there has been a violation.

3. Whether the trial Court erred in denying petitioner's motion to dismiss the indictment brought under Title 18, Section 1001, where there was no evidence that any claim had been made to *"a department and agency of the United States,"* as required by Title 18, Section 1001, and where the only claims were made to private insurance carriers.

4. Whether petitioner was entitled to a requested instruction pursuant to Rule 31(c), F.R.Cr.P., that the jury could find petitioner guilty of a lesser included offense and acquit him of the greater.

5. Whether the trial Court erred in failing to acquit petitioner upon the basis of plain error on the face of the record where the government failed to prove willfulness or guilty knowledge.

6. Whether petitioner was deprived of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States where he was deprived of fair trial guaranteed by that Amendment, when the Court and jury were not fully instructed as to the meaning and application of the word "willful", that is, it was done with an evil motive and bad purpose. (*U.S. v. Bishop,* 36 L.ed.2d 941)

7. Whether petitioner was deprived of his rights to fair trial under the Sixth Amendment to the Constitution of the United States where he was deprived of speedy trial guaranteed by that Amendment when the case involved elderly patients in convalescent homes, several of whom had died during the delays in presenting the case to the Grand Jury and bringing the case to trial.

8. Whether the Court is bound by the Acts of Congress limiting the scope and operation of Title 18, Section 1001, pursuant to Title 18, Section 6.

9. Whether a Grand Jury in weighing the evidence involving claims against private insurance companies,

or the United States Attorney who is drawing the pleading for them, can make the private insurance carrier "paying agents of the United States" and by this clever wording trying to make them an agency of the U.S. Government when Congress has not designated them as agencies and departments of the United States as defined by Title 18, Section 1001, and Title 18, Section 6. Whether Congress or the United States Attorney makes the laws.

10. Whether Title 18, Section 6, U.S. Codes, limits the power and jurisdiction of the government and Courts to prosecute claims filed with private insurance carriers and paid by private banks for health care in private convalescent hospitals. Whether the Social Security Act covers the entire field and was meant to do so by Congress and therefore only Title 42, Section 408(b) would apply. Whether each count of the indictment under Title 18, Section 1001 fails to state an offense against the laws of the United States.

11. Whether the evidence was sufficient to support the verdicts and judgments under the indictments for violation of Title 18, Section 1001 U.S. Cases.

12. Whether a Grand Jury in returning an indictment, and a prosecutor in preparing it and presenting it to them, can create a department and agency of the United States as created by Congress by calling such *California Blue Shield* a "paying agent for the Social Security Administration".

13. Whether a Grand Jury in returning an indict-

ment, and a prosecutor in preparing it and presenting it to them, can create a "department and agency" of the United States as created by Congress by calling Occidental Insurance Company a "paying agent for the Social Security Administration".

14. Whether a Grand Jury in returning an indictment, and a prosecutor in preparing it and presenting it to them, can create a department and agency of the United States as created by Congress by calling Travelers Insurance Company a "paying agent for the Social Security Administration".

15. Whether the Court below erred in failing to grant motions to dismiss the indictment.

16. Whether the Court below erred in refusing to consider plain error on the face of the record under Rule 52(b), F.R.Cr.P., where the trial Court failed to give an instruction on the word "willfully" as defined in cases in this Court and particularly *U.S. v. Bishop,* 36 L.ed.2d 941, where each count specifically alleged that the acts were done wilfully, that is, with an evil motive and bad purpose.

17. Whether the failure of trial counsel to raise essential defenses in the case and to preserve the petitioner's rights on appeal caused the trial to be a sham and deprived petitioner of essential rights of defense; these included the failure to move for judgments of acquittal required by Rule 29, F.R.Cr.P., both at the end of the government's case and petitioner's case; failure to submit a full and clear definition of the

word "willfully" as charged in each count of the indictment; the failure to tender an instruction on the definition of the word "willfully"; failure to object to prejudicial argument of the prosecutor depriving petitioner of fair trial; failure to complete offers of proof which he had told the Court he would do; failure to ask for a continuance to prepare new matters of professional care and competency regarding the quality of The Doctor's care of his patients; failure to object to constant references to petitioner as "the man with the beard" as seeking to prejudice the jury against him; failure to object to the incompetency of certain witnesses produced by the prosecution.

18. Whether the Court erred and invaded the province of the jury in telling the jury that California Blue Shield, Occidental Life Insurance Company and Travelers Insurance Company are *"departments and agencies of the United States"* where Congress has not designated them as such and whether this was a question of fact for the jury to determine from proper instructions.

19. Whether the defense counsel failed to present essential defenses in the cases when he had available five competent and percipient witnesses whose names were in the indictment and whom he failed to produce to rebut the prosecutor's evidence that the Doctor had not seen his patients two times per week or more.

20. Whether Congress has provided that Title 42, Section 408(b), U.S. Codes, preempted the field in re-

spect to any claim for medical services which arise under Medicare.

21. Whether Title 18, Section 1001, U.S. Codes, inherently and as construed and applied in this case, denies petitioner due process of law guaranteed by the Fifth Amendment to the Constitution of the United States in that no guidelines or definitions of acts that would constitute the crime, if one occurred. are set up in the statute or any rules or regulations pursuant thereto.

22. Whether the Court erred in failing to admit as evidence the numerous (more than 200) letters written to the Probation Officer regarding the Doctor's numerous visits to patients and the excellent care which he afforded them.

23. Whether the Court erred in denying petitioner's motion for a new trial, when the petitioner supported his motion with several affidavits which specifically contradicted the allegations of the indictment and which affidavits were not rebutted.

24. Whether the Court and prosecutor committed prejudicial error in failing to determine the competency of three percipient witnesses, to-wit, Audrey Gunderson, who had been declared insane and whose sanity was never officially restored; Robert E. Lane, a chronic alcoholic with a memory problem; and Margaret E. Clark, an elderly senile patient inmate with little or poor memory and totally in error regarding events.

25. Whether the prosecutor was under a duty to the defense to disclose the incapacity of these persons to be competent witnesses to the Court, the jury, and to defense counsel. (*Brady v. Maryland,* 373 US 83, 10 L.ed. 2d 215; *Giglio v. U.S.,* 405 US 150, 31 L.ed. 2d 104)

26. Whether the three private insurance companies had a right to limit the number of visits of the Doctor or to decide, without seeing the patients, how often they were entitled to receive medical care, or whether this was exclusively within the province of the Doctor. See: Title 42, Section 1395.

27. Whether the Court and presecutor erred in filing numerous counts of alleged similar transactions and whether such numerous counts were solely for the purpose of prejudicing the jury. (*Bramblett v. U.S.,* 231 F. 2d 489; *Braverman v. U.S.,* 317 US 49)

28. Whether all patients under Medi-Cal are under the exclusive care and jurisdiction of the State and are protected and governed by the Ninth and Tenth Amendments to the Constitution of the United States.

29. Whether petitioner was denied speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States and by Rule 48(b), F.R.Cr.P.

30. Whether the prosecutor failed to inform the Court and counsel that one of his witnesses had been found insane and her sanity had not been restored and whether he had a right to vouch, in effect, for her com-

petency by putting her on the stand as a prosecution witness.

31. Whether the prosecutor committed prejudicial error in his closing argument to the jury to the effect that the instant case involved $60,000 to $70,000 in false billings when the indictment only amounted to $2,-156.60 over a two year period in the charges made by the government. Whether this false argument deprived petitioner of fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

32. Whether the destruction of the nurses notes and logs prior to trial, and both before and after indictment, deprived the Doctor of essential matters of defense and entitles him to be discharged rather than remanded for a new trial. (*Brady v. Maryland,* 373 US 83, 10 L.ed. 2d 215; *In re Cameron,* 68 Cal. 2d 487, 504)

33. Whether the delay in presenting the matter to the Grand Jury (Rule 48(b), F.R.Cr.P.) and the delay in the trial deprived the Doctor of essential matters of defense where time caused elderly patients to become unavailable and distinguishes this case from facts in *U.S. v. Marion,* 404 US 307, 30 L.ed.2d 468, where Justice Brennan said) 404 US 334):

> **"When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive,' is unjustifiable. . . . The same may be true of any governmental de-**

lay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials."

34. Whether the delay in the trial during which potentially percipient witnesses died deprived petitioner of the benefits of speedy trial under the Sixth Amendment to the Constitution of the United States and of essential matters of defense. (*Brady v. Maryland. 373* US 83, 10 L.ed. 2d 215; *In re Cameron,* 68 C.2d 487, 504)

REASONS FOR GRANTING THE WRIT

This Court is called upon to construe and apply the words "knowingly" and "willfully" in an indictment returned under Title 28, Section 1001, as this Court has construed them in *U.S. v. Bishop,* 36 L.ed.2d 941, or as it has also construed them in *Keeble v. U.S.,* 36 L.ed.2d 844. Also, this Court is called upon to determine whether the Federal Rules of Criminal Procedure, to-wit, Rule 31(c), applies to this case where the Court refused a defense requested instructions regarding a lesser included offense. The petitioner testified he never made out a claim form, that secretaries made out his claim forms to private insurance companies and he signed them routinely. There was

no evidence that he did so with an evil motive or bad purpose. So far as the word "knowingly" was concerned, there was no evidence that he knew that the document was fraudulent or false as to a material matter.

This Court has said "It is not the purpose of the law to penalize frank difference of opinion or *innocent errors made despite the exercise of reasonable care.* Spies, 317 US at 496, 87 L.ed.418. Degrees of negligence give rise in a tax system to civil penalties."

Another fundamental question for this Court to determine is whether private insurance companies, licensed as State corporations, and given yearly contracts, can be designated by government prosecutors and federal Grand Juries as "departments and agencies of the United States" which are permanent when such private companies have not been so designated by an Act of Congress. It was prejudicial error for the trial Judge in this case to instruct the jury, as a matter of law, that these private insurance companies became agencies and departments of the United States as 'paying agents" and herein for the purpose of this prosecution because the prosecutor, in preparing the indictment, and the Grand Jury, in voting it, called these companies "paying agents", which still did not and does not make them *agencies and departments* of the United States designated as such by Congress.

It is important for this Court to so determine and hold to this effect, and order the indictment reversed.

Justice Thurgood Marshall in *New York Times Co. v. U.S.*, 403 US 713, 741, 29 L.ed.2d 822, 840, posed an analogous question when he said "The issue is whether this Court or the Congress has the power to make the law."

In our case, the issue for this Court to determine is whether the United States Attorney for the Central District of California, the Grand Jury, and the trial Judge, or Congress has the power to make law. Congress has never made private insurance carriers agencies and departments of the United States. Therefore, this Court, in making its determination, must hold that the trial Court has no jurisdiction of the offenses charged under Title 18, Section 1001, U.S. Codes.

Another important question for this Court to determine is whether Title 18, Section 1001, can be applied to all sorts of corporations merely because they have contracts with the government, and not by reason of any Act of Congress. If that is the case, then this opens up the Federal Courts to all sorts of litigation never meant to be tried in the Federal Courts. It would involve private corporations who receive loans, subsidies or all kinds of moneys as private corporations for services rendered on contracts with the government; it would involve such handling with companies like Lockheed, Penn Central Railroad, air lines and many others. We do not think that Congress

meant to broaden the application of Title 18, Section 1001 to include lawsuits growing out of private persons with these contracting bodies whose primary contract is with the United States.

There would not be enough Courts to handle all this new Federal Court litigation, nor enough Courts of Appeal to consider the appeals, nor enough Supreme Court Justices to pass upon appeals or certiorari, resulting from the overabundance of such unnecessary flow of new business.

The early history of the statute Title 18, Section 1001 and those preceding it clearly indicated that the purpose and intention of Congress in including the phrase "before any department" was to protect the right of members of Congress and governmental officers and employees, if otherwise qualified, to appear as counsel before judicial tribunals as distinguished from executive departments and to receive a fee for their services. It was held that an indictment charging a violation of the Section had to have an allegation of the specific government department or agency before or in which the services were to be rendered and this fact was an essential element of an offense under the act. (*U.S. v. Waldin,* 122 F.Supp. 903, 904)

No case had been brought to the attention of the Court in which there was an indictment under the statute which failed to allege the specific department or agency in which the unlawful services were rendered or to be rendered.

In the indictment before this Court, no *department or agency* is specifically alleged, and none could be, as the three private insurance companies were then and are still private California corporations, each having received a yearly contract with the government and are in no different position than other companies who receive contracts from the government, such as Lockheeed, Litton, Boeing, Dow Chemical, MacDonald-Douglas, North American, and others too numerous to mention, who have not and do not become *agencies* or *departments of the government* because Congress has not specifically designated them as such, nor are they government corporations.

Since the indictment in this case fails to allege the specific department or agency before which it is claimed that Section 1001 was violated, *the indictment, and each count, fails to state an offense against the laws of the United States.*

In *U.S. v. Waldin,* 122 F.Supp. 903, 905, the Court said: "An indictment is required to set forth the elements of the offense sought to be charged. 'The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged***' *Hagner v. United States,* 285 US 427, 431, 52 S.Ct. 417, 419, 76 L.Ed. 861; *United States v. Debrow,* 1953, 346 US 374, 376, 74 S.Ct. 113."

In *U.S. v. Cohen,* 270 US 339, 70 L.ed. 616, the

Court held that the 1918 Act did not proscribe false statements made to a Customs Collector where the purpose was not to defraud the government of either its money or property.

Under the codification of December 1, 1873, the statute which had previously applied to military personnel was extended to cover every person who made a false claim to a department or agency of the United States as those were defined. The false claims division was extended to cover corporations in which the United States held stock.

In *U.S. v. Allen,* 193 F.Supp. 954, 957, in an opinion written by Judge Byrne, the Court said: "The following have been held to be 'agencies' within Sec. 1001, supra: Federal Bureau of Investigation, United States v. Stark, D.C. Md. 1955, 131 F.Supp. 190; War Assets Administration, Todorow v. United States, 9 Cir. 1949, 173 F.2d 439, certiorari denied 1949, 337 US 925, 69 S.Ct. 1169, 93 L.ed. 1733; exclusion board in military area established under Executive Order, United States v. Meyer, 2 Cir. 1944, 140 F.2d 652; Veterans' Administration, Sanchez v. United States, 1 Cir., 1943, 134 F.2d 279, certiorai denied 1943, 319 US 768, 63 S.Ct. 1325, 87 L.ed. 1717; Commodity Credit Corporation, Spivey v. United States, 5 Cir. 1940, 109 F.2d 181, certiorari denied, 1940, 310 US 631, 60 S.Ct. 1079, 84 L.ed. 1401. Although this list is by no means exhaustive, no case has been found in which there has been a prosecution under Sec. 1001, for false state-

ments made by a witness in the course of proceedings before the federal Grand Jury." (Case dismissed, *U.S. v. Allen,* 193 F.Supp. 959)

The government requires all agencies and departments of government to be listed in the United States Government Organization Manual and to place their names in the Federal Register in the Office of the Federal Register, National Archives and Records Services, Washington, D.C. 20408. The Manual issued by the Office of the Federal Register does not contain a listing for the names of Occidental Life Insurance Company, a branch of Trans America, Travelers Insurance Company or Blue Shield. None of the checks which the Doctor received for his services were issued by any named governmental agency or department. All of them were on the stationery and checks of the particular insurance company involved. In 1967, on July 4, the government passed certain amendments to the Administrative Procedure Act (4 USC Sec. 552) to become popularly known thereafter as the Freedom of Information Act. These three insurance companies are not listed as governmental agencies under the Freedom of Information Act either.

A penal statute must be strictly construed. (*M. Kraus & Bros. v. U.S.,* 327 US 614, 90 L.ed. 894)

Nothing in Title 18, Section 1001 says that filing a statement with an insurance company is an offense against the laws of the United States.

In the leading case of *U.S. v. Gilliland*, 312 US 86, 96, known as the Hot Oil Case, it appeared that the President of the United States was authorized to prescribe regulations for the enforcement of the Act, including the requirement "of reports, maps, affidavits and other documents relating to the production, storage, refining, processing, transporting or handling of petroleum and petroleum products." Under this authority the President designated the Secretary of the Interior and the latter promulgated regulations which the President approved. (*U.S. v. Gilliland*, 312 US 86, 89-91)

It is evident from this case that the Court had set up in its opinion the requirements of due process of law which were complied with in the Hot Oil case. But they are entirely lacking in the case before this Court. No requirement or regulation is prescribed for doctors by the Social Security Act. Title 42, Sec. 1395 forbids it.

Another issue of great importance for this Court to determine is whether this petitioner was deprived of an essential defense in his case when the Court failed to instruct the jury fully as to the definition of the word "willfully." The trial Court gave the following definition: "An act is done willfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids." (R.T. 1344) But this is only half the definition. The important part is

in the second second half, that is to say, with bad purpose or evil intent.

Devitt and Blackmar on Federal Jury Practice and Instructions, (2d ed.) page 312, defines willfully as follows: "An act is done 'willfully' if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, *with bad purpose* either to disobey or to disregard the law."

Omission to charge that the government must establish that the defendant acted "willfully" was held to be "plain error" in *U.S. v. Krosky,* 418 F.2d 65 (6th Cir. 1969), a selective service case.

In *U.S. v. Bishop,* 36 L.ed.2d 941, 951, the Court said that the requirement of willfulness connotes "bad faith or evil intent", Murdock, 290 US 398, or evil motive and want of justification, Spies, 317 US 498.

Although no request was made by defense counsel for full and correct instructions, earlier cases in the Ninth Circuit hold that the instruction given to the jury should contain a definition of the word "willful" and that it was fundamental error to omit to give it so that the Court must take notice of it as plain error under Rule 52(b), F.R.Cr.P.

See also: *Forster v. U.S.,* 237 F.2d 617, 619, where Judge Chambers said "Willfulness implies bad faith and an evil motive".

In *Bloch v. U.S.,* 221 F.2d 786, the Court held that it was fundamental error going to the essence of the

case to omit the correct and full definition as to the meaning of the word "willfully". (Rule 52(b), F.R.Cr.P.)

There is no evidence in the record that the Doctor acted willfully in the signing of the forms presented to the private insurance companies.

The Doctor testified that in signing the forms he relied on his girls, that the signing was routine. He signed his name at least 200 or 300 times a day to all kinds of forms that come across his desk. (R.T. 991) There was no evidence that these forms were signed willfully or that there were not innocent errors made despite the exercise of reasonable care. (*Spies v. U.S.*, 317 US at 496, 87 L.ed. 418; *U.S. v. Bishop*, 36 L.ed. 2d 941) This is within the Supreme Court's context of its consistent interpretation of the word "willful" to require an element of mens rea before there could be a conviction.

In *Shuttlesworth v. Birmingham*, 382 US 87, 15 L.ed.2d 176, and in *Thompson v. Louisville*, 362 US 199, 4 L.ed.2d 654, the Supreme Court of the United States held that it was a violation of due process of law guaranteed by the Fifth Amendment where the conviction rests upon the failure of any evidence at all to support the conviction. (362 US 199, 4 L.ed.2d 655, 382 US 87, at 95, 15 L.ed.2d 176)

The burden was upon the prosecution to prove *willfulness*. There is no evidence whatsoever in this rec-

ord that Dr. Matanky acted wilfully as the Supreme court has defined it in *U.S. v. Bishop,* 36 L.ed.2d 941, and in the series of Ninth Circuit cases cited above. This entitled him to judgments of acquittal. (*Keeble v. U.S.,* 36 L.ed.2d 844)

It is important for this Court to decide the many issues raised in our questions presented. One of these was counsel's duty to investigate carefully all the defenses of fact and of law that were available to petitioner and to prevent them at trial.

> **"And if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance of counsel to which he is entitled." (Justice Traynor in *People v. Ibarra,* 60 Cal. 2d 460, 464)**

Defense counsel omitted to make motions for judgments of acquittal under Rule 29, both at the end of the government's case and at the end of his own case. He failed to ask for an instruction fully defining the word "wilfully", which covered a defense to each count in the indictment. Without this full definition, the jury was without guide or rudder to chart its course to a safe landing of freedom for the petitioner. He also failed to guide the Court and jury as to the definition of the words "agency and department of the government", as set forth in Title 18, Section 1001 and Title 18, Section 6, who are not set forth as "paying agents" for a private insurance company. These are among the more serious and prejudicial omissions of counsel

to act, and he also failed to protect petitioner's right to a fair trial when the prosecutor constantly alluded to the petitioner as "the man with the beard", and he failed to object sufficiently to the argument outside of the evidence in the case that there was $60,000 to $70,000 involved when the only amount named in the indictment in dispute was $2,156.60 over a two year period, and even this was of course debatable and subject to proof that it was erroneous.

He also failed to ask for a continuance so that he could prepare to meet the argument as to the quality of care which the prosecutor had raised, although not mentioned in and beyond the scope of the indictment, stating he was fully unprepared, but he did not ask for a continuance to prepare, nor did he move to dismiss this procedure as altering the indictment. (*Ex parte Bain,* 121 U.S. 1.)

There was this presented for this Court's consideration whether the matter not alleged in the indictment may be gone into by the prosecutor without in effect altering and enlarging the indictment. (*Ex parte Bain,* 121 US 1) Defense counsel did object to the examination of a Dr. Lowell B. Ford regarding the quality of care of the patients of Dr. Matanky. He pointed out to the Court that the indictment specifically charged only that the petitioner had billed for visits which the indictment claimed he did not make; that all of the evidence had been directed to that particular issue. There was no issue raised by the indictment as to the

quality of care. Thus the defendant was placed on trial on an offense not charged and therefore violated of due process of law. (*Cole v. Arkansas* 333 US 196, 92 L.ed. 644) We submit that petitioner was not on notice by the indictment that he was to meet this issue and be prepared on it; that, in effect, it was in addition to the allegations of the indictment which cannot be done either by a bill of particulars or otherwise. (*U.S. v. Russell,* 369 US 749, 770, 771, 8 L.ed. 240, 254, 255) (See R.T. 559-561)

At page 738, although not really prepared the defense sought to bring out the quality of care and the conduct of Dr. Matanky in the treatment of this patient. The government objected and the objection was sustained. (R.T. 738)

The petitioner was entitled to a dismissal of the indictment for want of speedy trial. The government's investigation dated back to 1968. The patients and persons involved were elderly and several knowledgeable witnesses died in the meantime. The indictment was not returned until April 5, 1972. These witnesses were no longer available. As said in a headnote in *Strunk v. U.S.,* 37 L.ed.2d 56, 58: "(8) In light of the policies which underlie the constitutional right to a speedy trial, dismissal is the only possible remedy where a speedy trial has been denied."

As said in *Barker v. Wingo,* 407 US 514, 531, 33 L.ed.2d 101, the ultimate responsibility for such circumstances must rest with the government rather than

with the defendant. This serves to reaffirm what the Court held earlier in *Dickey v. Florida,* 398 US 30, 37-38, 26 L.ed.2d 26. (Also see: *Smith v. Hooey,* 393 US 374, 21 L.ed.2d 607; *U.S. v. Ewell,* 383 US 116 15 L.ed. 2d 627; *Klopfer v. North Carolina,* 386 US 213, 18 L.ed.2d 1)

In *In re Cameron,* 68 Cal.2d 487, 504, Chief Justice Traynor said: "The police or prosecution may disable the state from ever giving a defendant a fair trial if they have lost or destroyed or otherwise made unavailable vital defense evidence. (See *People v. Hall,* 62 Cal. 2d 104, 113, fn. 8; *In re Imbler,* 60 Cal.2d 554, 567; *People v. Carter,* 48 Cal.2d 737, 747.) If this were such a case, *Cameron* should be discharged rather than remanded for a new trial."

Several of the nurses testified that they threw away the nurses' daily logs even after the indictment was returned. (R.T. 347) None were preserved to establish any fact in connection with this case even though it was admitted that the Doctor's presence was noted in the logs and notes, contrary to the charges in the indictment, and they would have established visitation of two times per week to his patients. The destruction of the notes and logs persited and continued even after the indictment thus depriving the Doctor of essential matters of defense. (*Brady v. Maryland,* 373 US 83, 10 L.ed.2d 215; *In re Cameron,* 68 Cal.2d 487, 504)

In view of the above facts, the judgments should

be reversed and the case ordered dismissed. (*Strunk v. U.S.*, 37 L.ed.2d 56)

WHEREFORE, petitioner prays that this Honorable Court grant certiorari and reverse the judgments below and order the Court below to enter judgments of acquittal.

Respectfully submitted,

MORRIS LAVINE
Attorney for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. SEYMOUR MATANKY, M.D., *Defendant-Appellant.*	No. 73-1190

[July 5, 1973]

On Appeal from the United States District Court for the Central District of California

Before: HAMLIN and CARTER, Circuit Judges, and BOLDT, District Judge*

HAMLIN, Circuit Judge:

Seymour Matanky, M.D., appellant herein, appeals from his conviction in the United States District Court for the Central District of California on all 39 counts of an indictment for violations of 18 U.S.C. Section 1001.[1] Appellant received a suspended prison sentence and fines totaling $58,500.00. We affirm.

*The Honorable George H. Boldt, United States District Judge, Western District of Washington, sitting by designation.

[1] 18 U.S.C. § 1001 provides as follows:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Matanky is a medical doctor, practicing in the San Fernando Valley, Los Angeles County, California. During the period covered in the indictment (November, 1968-October, 1970), appellant had numerous patients at various San Fernando Valley convalescent hospitals. Many of his patients were over 65 and covered by the Medicare Act of 1965, 42 U.S.C. Section 1395 *et seq.*

Medicare is administered by the Social Security Administration, an agency of the United States Department of Health, Education and Welfare (H.E.W.). To process and pay Medicare claims, H.E.W. has entered into contracts with certain private insurance carriers, including California Blue Shield, Occidental Life Insurance Company, and Travelers Insurance Company. *See* 42 U.S.C. Section 1395u.

Claims made by medical doctors for services rendered to Medicare patients are submitted to the private carriers on a document entitled "Request for Medicare Payment." (Social Security Form 1490). The private carriers utilize federal funds to pay Medicare claims. *See generally, Aquavella v. Richardson,* 437 F.2d 397, 399 (2 Cir. 1971).

During the period in question, Matanky submitted thirty-nine 1490 forms to the aforementioned private insurance carriers, who were under contract with the federal government to process and pay Medicare claims. All of the 1490 forms contained appellant's representation that he had made a certain number of convalescent hospital visits to a particular patient in a given month. The 1490 forms further contained representations as to the particular dates of the month that the visits were made to the patients.

In April, 1972, the grand jury returned a forty-six count indictment, charging appellant with the section 1001 violations. Each count thereof alleged in essence that appellant had made or caused to be made false statements and representations in a matter "within the jurisdiction of [a] department or agency of the United States." Specifically, the indictment alleged that appellant had submitted to certain private insurance carriers, acting as government paying agents, documents entitled "Request for Medicare Payments" (form 1490), representing thereon that he had rendered certain described medical services to named patients, reimbursable under Medicare, when in fact he had not rendered such services.

Appellant was arraigned in May, 1972, pleading not guilty to each count. In June, 1972, he filed a Motion to Dismiss, upon the grounds that 42 U.S.C. Section 408, proscribing false statements in an application for payment under the Social Security Act, precluded a prosecution under section 1001. The district court denied the motion. *United States v. Matanky*, 346 F.Supp. 116 (D.C. Cal. 1972).

Prior to the trial's commencement, and upon the Government's motion, Counts thirty-three through thirty-nine of the indictment were dismissed. After a three week jury trial during October, 1972, the jury returned verdicts of guilty as to each of the thirty-nine remaining counts.

After the denial of the various post-trial motions, appellant filed a timely notice of appeal. Our jurisdiction is predicated upon 28 U.S.C. Sections 1291 and 1294.[2]

Appellant raises numerous issues in this appeal, none of which we find meritorious, and many of which are frivolous.

I.

Appellant first contends that the indictment fails to state an offense against the United States. He further argues that "the language of section 1001 is sufficiently unclear and indefinite to violate due process of law." *See, e.g. Winters v. New Jersey*, 333 U.S. 507 (1948); *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

In support of the first above noted contention, appellant urges that inasmuch as the 1490 forms were submitted to the private insurance carriers rather than directly to the government, they cannot be deemed to contain statements "in a matter within the jurisdiction of any department or agency of the United States," within the meaning of section 1001. A similar contention was raised and rejected by this court in *United States v. Kraude*, 467 F.2d 37, 38 (9 Cir.), *cert. denied*, 409 U.S. 1076 (1972), wherein the private carriers were viewed as Government paying agents for the purposes of section 1001.

[2]Between the times of the indictment and throughout the trial, appellant was represented by James P. Cantillion. In November, 1972, Morris Lavine became appellant's attorney of record. Mr. Lavine has been responsible for the prosecution of this appeal.

As such, we find no vagueness problems with section 1001, either as construed or as applied to this case. *United States v. Kraude, supra. See Haddad v. United States,* 349 F.2d 511, 514 (9 Cir.), *cert. denied,* 382 U.S. 896 (1965); *United States v. Johnson,* 284 F.Supp. 273, 278 (W.D. Mo. 1968), *aff'd* 410 F.2d 38, *cert. denied* 396 U.S. 822 (1969); *United States v. Houcks,* 224 F.Supp. 778, 779-80 (W.D. Mo. 1963). *See also, United States v. Gilliland,* 312 U.S. 86 (1941).

II.

Another contention is that appellant was denied due process of law because of the multitude of counts charged in the indictment. His reliance upon *Bramblett v. United States,* 231 F.2d 489 (D.C. Cir.), *cert. denied,* 350 U.S. 1015 (1956), in support of this contention is misplaced. The *Bramblett* appellant was charged in seven counts of an indictment with violating section 1001, but only one false misrepresentation was ever made or submitted. Unlike *Bramblett,* here each count was based upon a different factual misrepresentation. Different proofs of fact were required, and proved, for each misrepresentation. There was no error. *United States v. Schrenzel,* 462 F.2d 765, 771 (8 Cir. 1972); *United States v. Eskow,* 422 F.2d 1060, 1064 (2 Cir.), *cert. denied,* 398 U.S. 959 (1970).

Braverman v. United States, 317 U.S. 49 (1942), is not in point.

III.

Appellant's further contention is that the evidence produced at trial is insufficient to support the jury's verdicts of guilty.

We briefly summarize the relevant testimony elicited at trial, mindful that the evidence must be considered in the light most favorable to the Government. *Glasser v. United States,* 315 U.S. 60, 80 (1943); *United States v. Baxter,* ___ F.2d ___ (9 Cir., February 16, 1973, No. 71-2082) (slip opinion at 3).

Testimony at trial was received from appellant's former convalescent hospital patients, and from nursing personnel at the various facilities. The testimony of the former patients concerning the frequency of visits to them by appellant severely contradicted his own claims. For instance, while appellant claimed to

have visited certain patients two or more times per week, these same patients testified that the visits occurred at a frequency of once or twice per month. Testimony by the nursing personnel corroborated the testimony of the patients.

The record indicates that certain patients were absent from particular hospitals on dates appellant allegedly visited them.

Circumstantial evidence produced at trial established that appellant had a busy private office practice, and that he was not absent from that office for the substantial periods of time which would have been necessary to have made all the visits alleged on the 1490 forms. Further, the Government indicated at trial that appellant changed his billing practices after an investigation of his practices was commenced in October, 1970.

We have carefully reviewed the record in this case. We are convinced that there is substantial evidence supporting the jury verdicts. It was for the jury to weigh any conflicting testimony. In attempting to retry his case here, appellant misconstrues the function of an appellate tribunal.

IV.

Appellant also contends that he was denied a fair trial because he was referred to by the prosecutor at trial as the "man with the beard." This contention is untenable. The record indicates that reference to appellant's plumage was solely for ease of identification. There was no prejudice. *Cf. Ham v. South Carolina*, 409 U.S. 524 (1973); *id.*, at 529-30 (Douglas, J., dissenting and concurring).

V.

Appellant next contends that the district court erred in permitting testimony relating to the "quality of care" as rendered by appellant to his patients. This assignment of error is based upon the testimony of Dr. Lowell Ford, an expert witness called by the Government.

Our review of the record indicates that Dr. Ford testified as to the meaning of certain codes used by medical doctors in noting particular treatments administered to particular patients. His testimony did not relate to appellant's "quality of care." We see nothing prejudicial in this testimony.

But even assuming *arguendo* that there was some testimony regarding "quality of care," admissibility thereof must be weighed in relation to its relevance. This is an area wherein the trial judge has traditionally enjoyed a wide discretion. *United States v. Campbell*, 466 F.2d 529, 530-31 (9 Cir. 1972).

VI.

Another contention is that allegedly prejudicial pretrial publicity resulted in an unfair trial.

The morning of the day the grand jury returned the indictment against appellant, April 5, 1972, there appeared in the Los Angeles *Times* an article concerning the Government charges against appellant. Appellant contends that this one article prejudiced the trial conducted six months later. There was, however, no showing that any members of the trial jury read or were aware of the newspaper article. *United States v. Orand*, ___ F.2d ___ (9 Cir., March 6, 1973, No. 72-2064) (slip opinion at 4). *Cf. Sheppard v. Maxwell*, 384 U.S. 333 (1966).

To the extent appellant claims prejudicial impact upon the grand jury which returned the indictment, we are referred to no authority indicating that prejudicial pre-trial publicity, assuming the existence thereof here, may void a grand jury indictment.

VII.

Appellant further assigns error to a statement made by the prosecution in its closing argument to the jury to the effect that the instant case involved $60,000-$70,000 in false billings. Appellant notes that only $2,156.60 was involved.

The objected-to statement was offered apparently in response to a defense statement belittling the amount involved in one of the counts. Further, documents introduced into evidence could be seen as permitting certain inferences, including the sum quoted by the prosecution.[3] We again deal with an area traditionally

[3]From the 1490 forms in evidence, there was evidence from which it might be inferred that until October 1970, the appellant billed as if he had seen all of his Medicare patients on an average of eight times per month. The appellant billed Medicare for $16.00 per visit, which would equal $180.00 per month average per patient. With an average of only 50 patients the billings would come to $76,800.00 a year.

shunned by appellate courts, and we are unable to conclude that the trial judge abused his discretion in permitting the above statement. *United States v. Roth*, 466 F.2d 1111, 1113 (9 Cir. 1972); *United States v. Cotter*, 425 F.2d 450, 452 (1 Cir. 1970).

Further, in light of the overall posture of the Government's case, any possible prejudice would have been harmless error. *Chapman v. California*, 386 U.S. 18, 24 (1967); Rule 52(a), F.R.Crim.P.

VIII.

Appellant's contentions regarding jury instructions given, and refused, by the trial court are without merit. As to those instructions, given or omitted, not objected to at trial, appellant cannot raise objections thereto for the first time on appeal. *United States v. Liantaud*, 466 F.2d 1342, 1343 (9 Cir. 1972); Rule 30, F.R.Crim.P. Further, we find no error in the trial court's proffered instructions, nor in its refusal to give those offered by appellant. *Cf. United States v. Bagby*, 451 F.2d 920, 927 (9 Cir. 1971); *United States v. Harvey*, 428 F.2d 782, 783, n. 1 (9 Cir. 1970).[4]

IX.

Appellant's contention that the district court erroneously permitted certain allegedly incompetent witnesses to testify is likewise without merit.

Appellant on appeal urges that Mrs. Gunderson, a Government witness and former patient of the appellant, was insane at the time of her testimony. The record does not support this contention. The record shows only that there was testimony that on admission to the hospital, her diagnosis was "schizophrenia," and that she had previously been a patient at Camarilla State Hospital. Appellant was aware of these facts, and made no objection at trial to her competency as a witness.[5] There was no *Brady*[6]

[4]The trial court's failure to include the concept of "bad purpose or evil intent" in its charge regarding "Willful." as required in criminal tax prosecutions, *Bishop v. United States*, ___ U.S. ___ (May 29, 1973), to which no objection was made, is not here plain error requiring reversal. *Cf. Bloch v. United States*, 221 F.2d 786, 788 (9 Cir. 1955).

[5]Appellant's reliance upon *District of Columbia v. Armes*, 107 U.S. 519 (1882), is misplaced.

[6]*Brady v. Maryland*, 373 U.S. 83, 87 (1963).

deception practiced by the prosecution. *Cf. Giglio v. United States*, 405 U.S. 150 (1972). Mrs. Gunderson's credibility was a matter for the jury to determine. *Shibley v. United States*, 237 F.2d 327, 334 (9 Cir.), *cert. denied*, 352 U.S. 873 (1956).

Appellant further asserts that the district court improperly permitted another Government witness, Robert Lane, to testify. Appellant urges that Lane, another of appellant's former patients, was a victim of alcoholic and mental problems. Nothing in the record indicates that Lane was insane at the time of his testimony. His medical records were admitted into evidence. Again, his credibility was a matter for the jury to determine. *See Shibley v. United States, supra.*

X.

Finally, appellant contends that he was denied effective assistance of counsel at trial. We disagree, as did the trial judge who, at the conclusion of trial, stated that Mr. Cantillion, the defense counsel, "gave a fine representation" of appellant. R.T. 1435.

"Our careful perusal of the entire record convinces us that appellant was convicted not by reason of incompetent or inadequate representation by counsel, but by reason of the overwhelming weight of the evidence produced against him." *United States v. Valenzuela-Mendoza*, 452 F.2d 773, 774 (9 Cir. 1971).

XI.

Other appellate contentions, not detailed above, have been carefully reviewed, and found to be similarly without merit.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 73-1190
SEYMOUR MATANKY, M.D., Defendant-Appellant.	)	

Appellant's petition for rehearing is denied.

/s/ OLIVER D. HAMLIN
/s/ JAMES M. CARTER
Circuit Judges
/s/ GEORGE H. BOLDT
District Judge

APPENDIX "C"

346 F. Supp. 116-119

UNITED STATES of America,
Plaintiff,
v.
Seymour MATANKY, M.D., Defendant.
Crim. No. 10106.

United States District Court
C. D. California.
July 14, 1972

On defendant's motions to dismiss prosecution on ground he should have been charged under different statute, the District Court, William P. Gray, J., held that existence of statute, providing misdemeanor penalties for anyone who makes false statement of a material fact in application for payment under medical assistance provisions of Social Security Act, did not preclude prosecution, of offense falling within its provisions, brought under prior statute providing felony penalties for anyone who in any manner within jurisdiction of any department or agency of the United States knowingly and wilfully makes any false statements.

Motion denied.

1. Fraud Key 68

Existence of statute, providing misdemeanor penalties for anyone who makes false statement of a material fact in application for payment under medical assistance provisions of Social Security Act, did not preclude prosecution, of offense falling within its provisions, brought under previously enacted statute providing felony penalties for anyone who in any manner within jurisdiction of any department or agency of the United States knowingly and wilfully makes any false statements. 18 U.S.C.A. § 1001; Social Security Act, § 208(b), 42 U.S.C.A. § 408(b).

2. Statutes Key 223.4

Application of concept that a later special statute supersedes the earlier general law must be narrowly confined.

William D. Keller, U. S. Atty., Eric A. Nobles, Chief, Crim. Div. by Robert C. Bonner, Asst. U. S. Atty., Los Angeles, Cal., for plaintiff.

James P. Cantillon, Cantillon & Cantillon, Beverly Hills, Cal., for defendant.

WILLIAM P. GRAY, District Judge.

The defendant, a medical doctor, is currently being prosecuted under 46 counts of an indictment, each of which charges him with having represented to an ap-

propriate agency of the United States Government that he had rendered to named patients medical services compensable under the Social Security Act when in truth he had not rendered such services.

Each count of the indictment is brought under 18 U.S.C. § 1001, which provides, in pertinent part, that "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully . . . makes any false . . . or fraudulent statements or representations, . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." This provision has been in its present form since June 25, 1948.

The defendant now moves to dismiss the prosecution on the ground that he should have been charged under 42 U.S. C. § 408, which provides misdemeanor penalties for anyone who makes any false statement or representation of a material fact in any application for payment under the medical assistance provisions of the Social Security Act (§ 408(b)).

[1] The Government and the defendant agree that the acts of which the defendant is accused are covered by the terms of each of the two statutes. The question is whether the existence of 42 U.S.C. §408(b), which was enacted later than was 18 U.S.C. § 1001, precludes prosecution under § 1001 of an offense that falls within the provisions of § 408(b). For reasons hereinafter set forth, this question is answered in the negative, and the motion to dismiss must accordingly be denied.

In urging his motion, the defendant relies upon the proposition that

> "... where here are two acts, one special or specific act which certainly includes the matter in question, and the other a general act which standing alone would include the same matter, so that the provisions of the two conflict, the special or specific act must be given the effect of establishing an exception to the general or broad act." 50 Am. Jur. 566, Statutes § 564.

The defendant also cites the opinion in Abbate v. United States, 270 F. 735, 736 (9th Cir. 1921), which does contain the above quoted statement. However, that case held only that the generally applicable provisions of the National Prohibition Act did not repeal the express provisions of the "Bone Dry" Law of Alaska that Congress had previously enacted and which, as applied to the case there concerned, imposed harsher penalties than did the later act.

[2] Application of the concept that a later special statute supersedes the earlier general law must be quite narrowly confined, as is indicated by Justice Sutherland in speaking for the Court in Posadas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936):

> "The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of

repeals by implication: (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. . . ."

The second of the two categories obviously does not apply here, because the later act purports to deal only with a small segment of the broad coverage of § 1001.

With respect to the first category, the fact that one statute creates a felony and the other a misdemeanor might, upon first consideration, be thought to create an irreconcilable conflict, insofar as their mutual application is concerned. However, such a possibility is negatived by the case of United States v. Gilliland, 312 U.S. 86, 95, 61 S.Ct. 518, 85 L.Ed. 598 (1941), which held that the forerunner of § 1001 (18 U.S.C. § 80) was not superseded by the "Hot Oil" Act (15 U.S.C. § 715), even though the penalty prescribed by the former was greater than under the latter. "The matter of penalties lay within the discretion of Congress. [18 U.S.C. § 80] covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations."

As the opinion in *Gilliland* also stated, the enactment and amendment of the statute upon which § 1001 was based ". . . indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction." Likewise here, in light of such intention on the part of Congress in enacting § 1001, this court cannot infer that the subsequent adoption of 42 U.S.C. § 408(b) reveals a "clear and manifest" intent to curtail the broad application of the earlier statute. If such had been the purpose of Congress, it would have been easy enough to say so. *See,* Cohen v. United States, 201 F.2d 386, 393 (9th Cir. 1953).

The defendant also urges that inasmuch as the conduct of which he is accused is covered by a statute that provides for felony penalties (§ 1001) and one that involves only a misdemeanor (§ 408), he is entitled to be prosecuted under the provisions that call for the more lenient penalty. He contends that the fixing of punishment is a judicial function and that the prosecutor should not have discretion as to whether a felony or a misdemeanor should be involved here. The authorities are to the contrary. In United States v. Chakmakis, 449 F.2d 315, 316 (5th Cir. 1971) the defendant was convicted on four counts of violating 18 U.S.C. § 1001 and was given a thirty-day consecutive sentence

on each count. On appeal, he raised the precise argument that is made here, namely, that he should have been prosecuted under 42 U.S.C. § 408. In affirming the conviction, the opinion of the court stated:

> "Leaving aside the fact that the defendant was sentenced as for a misdemeanor, it is quite clear that the enactment of the later section did not repeal the former and that the facts of the alleged offense fell within the terms of either statute. Hence, the prosecution could have been brought under either, at the discretion of the prosecutor."

A similar issue was involved in United States v. Eisenmann, 396 F.2d 565 (2d Cir. 1968). In affirming the conviction, the opinion commented as follows:

> "The wording of the two statutes which provide different penalties is thus in harmony with Congressional intent. There are many acts which are made criminal by two or more sections of the Code, and if the government chooses to prosecute the actor under the section providing the *harsher* penalty, he cannot complain." (Page 568).

The motion to dismiss is denied.